



CITY OF HAYWARD
AGENDA REPORT

AGENDA DATE 06/14/05

AGENDA ITEM _____

WORK SESSION ITEM WS #2

TO: Mayor and City Council
FROM: City Attorney
SUBJECT: Campaign Contribution Limits

RECOMMENDATION:

It is recommended that the City Council review and comment on this report and the attached documentation.

BACKGROUND:

On May 10th, the Council considered potential modifications to the City's Campaign Contribution and Spending Limits legislation. A copy of the May 10, 2005 Staff Report is provided as Attachment "A" for your reference. The Council's discussion focused on the following two issues: a) adding an aggregation provision that would combine contributions made by various entities owned or controlled by a single individual or group; and b) clarifying how "in-kind" contributions should be handled under the Ordinance. At the close of the discussion, Council requested that staff provide definitions for "in-kind" contributions and an aggregation provision for review and consideration.

On May 16, 2005, the Council was provided with a memorandum from the City Attorney containing the requested materials. A copy of said memorandum is provided as Attachment "B" for your consideration. In preparing the memorandum, staff reviewed the Campaign Spending and Contribution ordinances of Union City, Palo Alto, Fremont, Oakland, San Jose, Los Angeles, Berkeley, San Francisco and the model ordinance prepared by the League of California Cities. As pointed out in the memorandum, none of the above-listed cities specifically defines "in-kind" contributions. Rather than provide a definition, the subject matter is handled by providing a very broad definition of the term "contribution" so that it encompasses "in-kind" donations. Each of the ordinances reviewed specifically excludes "voluntary personal services" from the definition of contribution.

CONCLUSION:

If the Council determines modification of the City's Campaign Spending and Contribution Limit legislation is appropriate, staff will prepare the necessary documents to implement the Council's direction.

Prepared by:

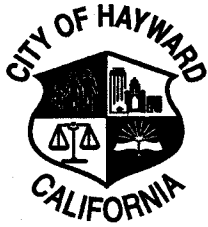
A handwritten signature in black ink, appearing to read "M. O'Toole", written over a horizontal line.

Michael J. O'Toole, City Attorney

Approved by:

A handwritten signature in black ink, appearing to read "Jesús Armas", written over a horizontal line.

Jesús Armas, City Manager



CITY OF HAYWARD AGENDA REPORT

AGENDA DATE 05/10/05

AGENDA ITEM _____

WORK SESSION ITEM WS#2

TO: Mayor and City Council
FROM: City Attorney
SUBJECT: Campaign Contribution Limits

RECOMMENDATION:

It is recommended that the City Council review and comment on this report.

BACKGROUND:

During a recent City Council meeting, Council Member Barbara Halliday requested that staff report to Council on issues of concern about the City's Campaign Spending and Contribution legislation that may have been raised during the 2004 election. The following report will provide a brief summary of the regulations and detail our experience with their application.

In October of 2002, the City Council added Article 13 to Chapter 2 of the Hayward Municipal Code. The addition established a voluntary expenditure limit of \$50,000 with annual CPI adjustments for local municipal elections and varying contribution limits for candidates. A contribution cap of \$250 was set for those candidates who do not accept the voluntary expenditure limit and a cap of \$1,000 was set for those who do agree to the expenditure limit.

The addition also contained provisions for criminal, civil and administrative penalties in the event there were violations of the Municipal Code provisions. Since violations of City Ordinances are deemed to be misdemeanors, they carry a penalty of up to \$1,000. In addition, this amendment also established an administrative or civil penalty of up to \$1,000 for each violation. To comply with the requirements of due process, the Municipal Code requires that notice of a violation be given and a hearing be conducted prior to the imposition of an administrative penalty. As the designated official for conducting municipal elections, the City Clerk is responsible for initiating a review process if evidence of a potential violation is presented to his/her Office. Upon receipt of such evidence, the Clerk is required to meet with the City Attorney to determine if probable cause exists to either forward the matter to the District Attorney for possible criminal prosecution or appoint independent counsel to serve as a hearing officer. If a hearing officer is appointed, all proceedings must be conducted pursuant to the Administrative Procedures Act contained in the Government Code.

Attachment A

The 2004 Municipal Election was the City's first experience with the above discussed expenditure and contribution limits. At the close of the nomination period, thirteen candidates had filed papers with the City Clerk. All of the candidates agreed to the City's expenditure limit and therefore all contributions were subject to the \$1,000 limit. A copy of the reported expenditures for the candidates is attached hereto. As you will note, expenditures ranged from \$1,000 on the low end to \$46,000 on the high end. Hence, each of the candidates spent less than the established limit of \$50,000.

During the course of the campaign, both my office and the City Clerk received inquiries regarding the interpretation and application of the contribution limitation. Both candidates and contributors asked about the absence of an aggregation provision in the legislation. Specifically, we were asked if multiple business entities, controlled by the same individuals, could make separate \$1,000 contributions to a candidate from each of their business entities. Since our regulations do not contain an aggregation provision, we advised that such multiple \$1,000 donations would not constitute a clear violation of the contribution limit. Hence, no criminal or civil penalties would be pursued. In addition, some candidates asked how to value in-kind contributions. For example, should market value or actual cost be used? Again, we advised that since the regulations were silent on the treatment of in-kind donations, criminal prosecution and/or the imposition of a civil penalty would not be warranted based upon the method of valuation used. Finally, we experienced a problem with the "Notification Requirement" contained in the legislation. To wit, Section 2-13.03 requires the City Clerk to "...prominently publish in the voter information portion of the sample ballot those candidates who have voluntarily agreed to the expenditure limits." Unfortunately, since our elections are consolidated with the County, only candidates and their statements were allowed.

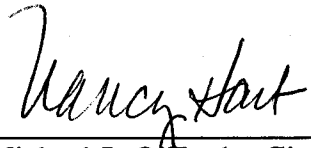
Modification of the Campaign Spending and Contribution Limit legislation rests completely within the discretion of the Council. If there is a desire to change the existing regulations, the Council may wish to consider the following issues:

1. The addition of an "aggregation" provision similar to that contained in the Government Code that will provide that contributions made by entities that are majority owned by any person or entity shall be aggregated so that the total contribution will not exceed the \$1,000 limit.
2. The additions of an "in-kind" provision that will require all in-kind contributions to be reported and valued as the Council specifies (either actual cost or market value).
3. The modification of Section 2-13.03 to require the City Clerk to publish a listing of the candidates for office and indicate whether such candidates have agreed to the voluntary spending limit. The list could also be published on the City's web site.

CONCLUSION:

The City's Campaign Spending and Contribution Limit legislation is a living document that will require review and potential modifications as we gain more experience with its application to actual elections. Staff has identified issues of concern and questions raised by candidates and contributors during the first election held with the legislation in place. The solutions listed above are presented for Council consideration.

Prepared by:


for _____
Michael J. O'Toole, City Attorney

Approved by:



Jesús Armas, City Manager

Attachment A

**TOTAL EXPENDITURES FOR CANDIDATES
2004 MUNICIPAL ELECTION**

| | <u>2003</u> | <u>2004</u> | <u>Total</u> |
|------------------------|-------------|-------------|--------------|
| Francisco Abrantes | | less than | \$ 1,000 |
| Cora Marie Baker | | less than | \$ 1,000 |
| Edward Bogue | \$ 878 | \$ 5,920 | \$ 6,798 |
| Gary R. Craig | \$ 3,206 | \$12,906 | \$16,112 |
| Barbara Halliday | \$ 4,504 | \$19,189 | \$23,693 |
| Olden Henson | \$ 2,399 | \$41,065 | \$43,464 |
| Barbara Harringer-Swar | | less than | \$ 1,000 |
| Joseph Hilson | \$ 5,041 | \$20,731 | \$25,772 |
| Robert Lopez | \$ 1,401 | \$ 7,573 | \$ 8,974 |
| L. Jason Moreno | | | \$ 2,000 |
| Bill Quirk | \$21,417 | \$25,229 | \$46,646 |
| Bill Ward | \$ 2,370 | \$25,369 | \$27,739 |
| Francisco Zermeño | \$12,690 | \$27,551 | \$40,241 |

Michael O'Toole

From: HendleyP@aol.com
Sent: Friday, April 29, 2005 8:29 AM
To: Michael O'Toole
Subject: City's campaign finance ordinance

Dear Mr. O'Toole:

On April 18, Barbara Sacks and I met with Mayor Cooper to discuss some ideas for improving the City's campaign finance ordinance which we understand will be reviewed by the City Council at an upcoming work session. The mayor asked us to meet with both the City Clerk and you about our ideas. So this past Monday, April 25 I met with the City Clerk who also suggested I meet briefly with you.

After meeting with Angie Reyes, I stopped by your office and left a message with your secretary asking for a brief meeting. I'd still like to meet with you if possible for about 30 minutes before the council's work session.

I am attaching our CA\$H proposal to this email. I'd especially like feedback from you on items #5 and #6.

Thank you for your time. I look forward to your response.

Peace,

Peter Hendley, (510) 582-7011
1716 Highland Blvd.
Hayward, CA 94542

Attachment A

5/2/2005

Campaign Solutions for Hayward

30232 Brookside Lane, Hayward, CA 94544 • Tel: 510-441-7487 • CampaignSolutionsHayward@go.com

2005 CASH Proposal – Working DRAFT

As part of CASH's ongoing effort to improve elections and governance in Hayward, we will suggest to the City Council a series of incremental changes to the City's campaign finance ordinance. We are seeking input from people who supported CASH in the past and other interested parties. Here are the reforms currently being considered.

1. Require all campaign statements to be filed electronically.
2. Post all campaign statements on the City's web site.
3. Require that all campaign mailers state the name of the committee or individual who paid for them. For campaign mailers, any single donor who contributed 20% or more of the cost of the mailer must be listed by name.
4. Require a copy of all campaign mailers to be filed with the City Clerk before being mailed. The City Clerk will not review the mailer, but will keep it on file for one year and make it available to the public.
5. Add an "aggregation" clause to the ordinance to prohibit an individual from giving more than the maximum contribution by using multiple corporations or PACs. Please refer to Appendix A for more details.
6. Subject non-candidate committees, such as PACs, Recall, Referendum and Initiative campaigns, to the same rules as candidate committees. Please refer to Appendix C for more details.
7. A loan from anyone other than the candidate shall be considered a contribution from the maker and guarantor of the loan and shall be subject to the contribution limits of the ordinance.
8. An in-kind donation from anyone other than the candidate shall be considered a contribution from the donor and shall be subject to the contribution limits of the ordinance.
9. Amend the ordinance to require the city to review all campaign finance reports for completeness, correctness and possible violations. Please refer to Appendix B for full details.

Appendix A

The following is sample language defining Aggregation taken from State Proposition 34. This language is part of current state law.

Proposition 34

Affiliated Entities Aggregation of Contributions Section 85311

(a) For purposes of this chapter the following terms have the following meanings:

(1) "Entity" means any person, other than an individual.

(2) "Majority-owned" means a direct or indirect ownership of more than 50 percent.

(b) The contributions of an entity whose contributions are directed and controlled by any individual shall be aggregated with contributions made by that individual and any other entity whose contributions are directed and controlled by the same individual.

(c) If two or more entities make contributions that are directed and controlled by a majority of the same persons, the contributions of those entities shall be aggregated.

(d) Contributions made by entities that are majority-owned by any person shall be aggregated with the contributions of the majority owner and all other entities majority-owned by that person, unless those entities act independently in their decisions to make contributions.

Campaign Solutions for Hayward

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Appendix A (continued)

| | | |
|-----------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Aggregation of Contributions Made by Affiliated Entities | <p>Under the Commission's <i>Lumsdon</i> (No. 75-205) and <i>Kahn</i> (No. 75-185) Opinions, the following contributions are aggregated for <i>reporting</i> purposes:</p> <ul style="list-style-type: none"> - Contributions from an individual and the business or corporation he or she controls. - Contributions from entities if the same person (or a majority of the same persons) directs and controls the contribution each entity makes. - Contributions from parents and subsidiaries, and from business entities with the same controlling owner, unless the entities act completely independently in their decisions to make contributions. | <p>Codifies the <i>Lumsdon</i> and <i>Kahn</i> "direction and control" standards. Requires aggregation of the following contributions for purposes of the contribution limits of Chapter 5:</p> <ul style="list-style-type: none"> - Contributions of an individual and any entit(ies) whose contributions are directed and controlled by that individual. - Contributions of two or more entities that are directed and controlled by a majority of the same persons. - Contributions made by entities that are majority-owned by any person and contributions of the majority owner, unless those entities act independently in their decisions to make contributions. (85311) |
|-----------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

| | | |
|-------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------|
| 85308 | <p>Contributions by spouse or child. Prohibits aggregation of spousal contributions and creates a presumption that contributions by minor children are from the child's parent or guardian.</p> | <p>By its terms, has general applicability to all "contributions," and therefore applies to local jurisdictions.</p> |
|-------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------|

Co-Chairs: Peter Hendley & Al Mendall

Evelyn Cormier • Ginny DeMartini • Jim Forsyth • Barbara Sacks • John Sands

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Appendix B

This appendix contains the detail of item #9. CASH is proposing that section 2-13.06 of the City's current campaign finance ordinance be rewritten as follows.

Section 2-13.06 VIOLATION OF TITLE; PROBABLE CAUSE; HEARING; NOTICE; ORDER

- (a) The City Clerk's office ~~will review~~ all campaign finance reports filed with the City for completeness, correctness and possible violations related to the campaign limits.
- (b) If an error or violation is found, the City Clerk ~~will notify the campaign~~ treasurer of the error or violation and give the campaign an opportunity to correct the error or violation.
- (c) *same as the current section 2-13.06.a*
- (d) *same as the current section 2-13.06.b*

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Appendix C


CASH has separated item number 6 into three separate, but related proposed reforms.

1. All Recall campaigns shall be subject to the same rules and limitations as candidate committees.
2. All PACs or other non-candidate committee which endorses or opposes one or more candidates during an election cycle, shall be subject to the same limitations as candidate committees for the that election cycle.
3. All Referendum, Initiative and Charter Amendment campaigns shall be subject to the same limitations as campaign committees.

Items 1 and 2 are especially needed because those are cases in which a non-candidate committee will, in effect, be opposing a candidate committee. And as a matter of fairness, if the candidate committee is required to abide by certain restrictions, then the non-candidate committees getting involved in those campaigns should be subject to the same limits.

**MEMORANDUM
OFFICE OF THE HAYWARD CITY ATTORNEY**

TO: Honorable Mayor and City Council

FROM: Michael J. O'Toole, City Attorney 

DATE: 05/16/05

SUBJECT: Campaign Spending and Contribution Ordinance

INTRODUCTION

In preparing this document, we have reviewed the Campaign Spending and Contribution ordinances of Union City, Palo Alto, Fremont, Oakland, San Jose, Los Angeles, Berkeley, San Francisco and the model ordinance prepared by the League of California Cities.

AGGREGATION PROVISION

The following is an aggregation provision typical of that found in most of the above-listed ordinances.

Aggregation of Contributions

- (a) For the purposes of the contribution limits of this Chapter, the following terms shall have the following meanings.
 - (1) "Entity" shall mean any person other than an individual.
 - (2) "Majority owned" shall mean any ownership of more than 50%
- (b) The contributions of an entity whose contributions are directed and controlled by any individual shall be aggregated with contributions made by that individual and any other entity whose contributions are directed and controlled by the same individual.
- (c) Contributions that are made by entities that are majority owned by any individual shall be aggregated with the contributions of the majority owner and all other entities majority owned by that person.
- (d) Contributions made by a husband and wife shall not be aggregated.

IN-KIND CONTRIBUTIONS

None of the ordinances listed above specifically define "In-Kind" contributions. While the more complex ordinances use a very broad definition of the term contribution, many simply refer to the broad definition of "contribution" contained in the Government Code. All of the ordinances that dealt with the topic excluded "volunteer personal services" from the definition of contribution. Following are two definitions of contribution for the Council's consideration:

City of Berkeley

Section 2.12.100 Contribution

"Contribution" means a gift, subscription, loan, advance, deposit, pledge, forgiveness of indebtedness, payment of a debt by a third party, contract, agreement, or promise of money or anything of value or other obligation, whether or not legally enforceable, made directly or indirectly in aid of or in opposition to the nomination or election of one or more candidates or the qualification for the ballot or voter approval of one or more measures. The term "contribution" includes the purchase of tickets for events such as dinners, luncheons, rallies and similar fund-raising events; a candidate's own money or property used on behalf of his or her candidacy; the granting to a candidate or committee of discounts or rebates not available to the general public; and payments for the services of any person serving on behalf of a candidate or committee, when such payments are not made from contributions the candidate or committee must otherwise report under the terms of this chapter. The term "contribution" further includes any transfer, gift, loan, advance, deposit, forgiveness of indebtedness, payment of a debt by a third party, pledge, contract, agreement, or promise of money or anything of value or other obligation, whether or not legally enforceable, received directly or indirectly by a committee from another committee. The term "contribution" shall not include a gift of service or labor, but shall include service or labor for which a payment is made, nor shall the term "contribution" include a gift of the use of personal or real property where the value of such use is not in excess of fifty dollars, nor shall it include food and beverages the value of which for any one event is no more than fifty dollars.

City of San Jose

12.06.050 Contribution

A. "Contribution" shall mean:

1. Any payment, loan, forgiveness or postponement of a loan, payment of a loan by a third party, or an enforceable promise to make a payment except to the extent that full and adequate consideration is received, unless it is clear from the surrounding circumstances that it is not made for political purposes.

2. An expenditure benefitting a candidate or committee made at the behest of a candidate, committee or elected officeholder is a contribution to the candidate, committee or elected officeholder unless full and adequate consideration is received for making the

expenditure.

3. Contributions include the purchase of tickets for events such as dinners, luncheons, rallies, and similar fund-raising events; the granting of discounts or rebates not extended to the public generally or the granting of discounts or rebates by television and radio stations and newspapers not extended on an equal basis to all candidates for the same office; the payment of compensation by any person for the personal services or expenses of any other person, if such services are rendered or expenses incurred on behalf of a candidate or committee without payment of full and adequate consideration; and the transfer of anything of value.

4. Volunteer personal services; payments made by an individual for his or her own travel expenses if such payments are made voluntarily without any understanding or agreement that they shall be directly or indirectly repaid to him or her; or independent expenditures made by purposes of this chapter.

If the Council desires to directly address the "In-Kind" contribution issue, the following definition may be helpful.

Section: "In-Kind" Contributions

For the purposes of this Chapter, In-Kind services shall mean any tangible good, item or service that is donated or given to a candidate. (e.g. food, alcohol, printing, postage, paid employee services, complimentary room rental etc.) Such contributions shall be reported and counted toward the contribution limits herein established. The term "contribution" shall not include a gift of service or labor, but shall include service or labor for which a payment is made, nor shall the term "contribution" include a gift of the use of personal or real property where the value of such use is not in excess of fifty dollars, nor shall it include food and beverages the value of which for any one event is no more than fifty dollars.